THE LONG ROAD TO SETTLEMENT FOR CLEANUP OF THE THEA FOSS WATERWAY, TACOMA, WASHINGTON[1]

Loren Dunn, Riddell Williams, PS, Seattle; Matthew Wells, Preston Gates & Ellis, LLP, Seattle; William J. Hengemihle, LECG, LLC, Wayne, PA; and Diane Adams, EnviroIssues, Seattle.

Abstract: *How should 80 parties who allegedly discharged pollutants to Tacoma's waterfront for more than a century (along with countless other defunct businesses) share an estimated $60 million bill for cleaning up contaminated sediments, and responsibility for performing the cleanup, under threat of enforcement by the U.S. Environmental Protection Agency? The alternative dispute resolution process for the Thea Foss Waterway tackled this thorny question. Using a hybrid arbitration/mediation model, a comprehensive and final settlement was achieved – thus avoiding delays to the cleanup plan as well as costly litigation. Notably, this same cost allocation and cleanup dilemma is yet to be resolved for numerous ports and urban river systems throughout the Nation.*

On March 3, 2003, the United States filed for court approval a settlement for cleanup of the Thea Foss Waterway in Tacoma, Washington. The settlement is between the United States and 80 private and state and local government entities, and will result in cleanup of the Thea Foss Waterway – which is at the heart of Tacoma's ambitious plans for redevelopment of its urban waterfront. A map of the waterway and surrounding area is provided in Figure 1. The settlement also resolves liability of all settling parties for over a hundred years of urban industrial activities that led to contamination of the waterway.

Under the settlement, four settling parties will perform the waterway remedy (consisting chiefly of the dredging and disposal of approximately 500,000 cubic yards of contaminated sediments and capping other areas of contamination where dredging is not feasible) while the others will resolve their alleged responsibility by making a one-time, lump sum cash contribution to a remediation trust fund. Also, the Washington State Department of Natural Resources (DNR), alleged to share liability as a result of historic harbor area leasing activities in the waterway, will contribute cash toward the cleanup and provide "in-kind" services to assist the performing parties with construction activities, such as the use of state-owned lands to facilitate cleanup.

This paper offers background information on the evolution of the project over the past 20 years (including nearly 5 years of complex ADR procedures), a summary of the issues, challenges and opportunities presented to the parties involved in the arbitration and mediation, and some insights on process design from the perspective of the parties, facilitator and the neutral.

---

[1] Submitted for the 11th Annual Northwest Dispute Resolution Conference, Shoreline Conference Center, 18560 First Ave NE, Seattle, WA, April 11-12, 2003

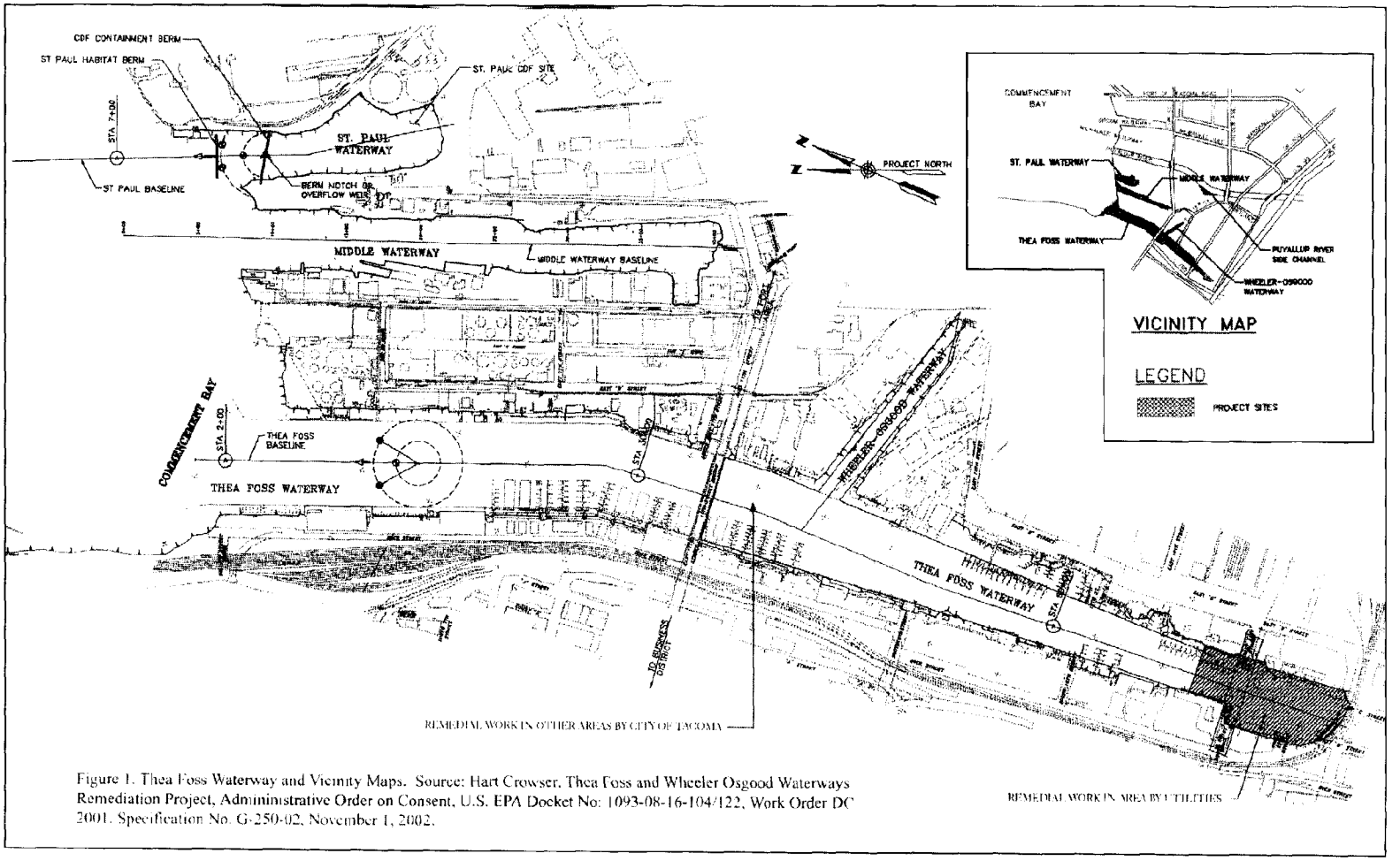

Figure 1. Thea Foss Waterway and Vicinity Maps. Source: Hart Crowser, Thea Foss and Wheeler Osgood Waterways Remediation Project, Administrative Order on Consent, U.S. EPA Docket No: 1093-08-16-104/122, Work Order DC 2001, Specification No. G-250-02, November 1, 2002.

Background

Listing of the Site and Early Cleanup Efforts (1983-1994)

The settlement roughly coincides with final selection of a cleanup plan for the waterway. Both settlement and cleanup decisions were a long time in the making. EPA listed the waterway as a federal "Superfund" site nearly 20 years ago – in September 1983. Between 1983 and 1989, EPA and the state Department of Ecology worked on initial investigation of the site and identification of the types of cleanup technologies remedies that could be employed.

During this time, EPA also identified parties it believed were potentially liable for cleanup of the site under Superfund's strict joint and several liability scheme (under the Superfund law, these parties are commonly referred to as "potentially responsible parties," or "PRPs"). EPA developed its list based on general information available at the site, and on detailed responses to its first round of requests for information. The requests for information were issued under Superfund's investigatory authority, and placed on the receiving parties a strict statutory obligation to investigate their potential involvement with the site and to provide all relevant information to EPA.

Focused Cleanup Efforts and Formation of Initial Working Group (1994-1997)

The City of Tacoma, wanting to spur the cleanup effort along, entered into an agreement with EPA in early 1994 to undertake further investigation of the waterway and to develop a specific cleanup plan. With the City taking the technical and administrative lead on investigation and design, many of the parties on EPA's initial list of potentially liable parties entered into an agreement with the City later in 1994 to participate in and partially fund the City's efforts.

This August 1994 agreement (the "Funding and Participation Agreement") and the working relationships that developed under it formed the nucleus around which the final settlement grew. Under the agreement, the City and approximately 20 other parties held regular meetings to review and discuss the progress of the investigation and design work. The City also committed to provide advance review copies of all key documents prior to submission to EPA. While the City and non-City parties occasionally sparred over technical or strategic issues, these ongoing opportunities for involvement were critical for keeping the core group of parties apprised of key developments between 1994 and final settlement in 2003. They also provided the parties and their representatives invaluable insights into each other's objectives, tactics and personalities – insights that all drew upon, whether consciously or not, throughout the settlement process.

Focused Settlement Efforts (1997-2003)

In early 1997, as the City's investigation and design work was beginning to come together, i.e., as a specific cleanup plan was emerging for the waterway, EPA issued a second round of information requests. This set of requests went out to a larger list of parties, many of whom had been identified by the City and core non-City parties as having some liability at the site. Again, the information request placed a statutory obligation on the receiving parties to diligently

investigate their potential involvement with the site and to provide all relevant information to EPA.

EPA used the information from responses to its second information request to revise its list of potentially liable parties. EPA then called all of these parties together in late 1997 to begin discussing eventual cleanup of the waterway – and to strongly encourage the parties to pursue serious settlement talks. EPA backed up its message with an offer of substantial seed money ($100,000) to initiate an alternative dispute resolution process.

The City and core non-City parties used this seed money to engage EnviroIssues in early 1998 for several key tasks. These included: inviting additional parties to join the arbitration process and what became known as the Participants Group; facilitating negotiation of the arbitration agreement among all of the participants, facilitating internal group communications and communications with the arbitrator, EPA, and other organizations; managing the local information repository and distribution of confidential documents; and serving as treasurer of the trust account for the group. EnviroIssues was also responsible for helping the group interview and engage a neutral arbitrator with expertise in Superfund liability issues, historical investigations, cost allocation for multiple source sites, sediment contamination, and technical and legal research. The group selected Mr. William J. Hengemihle (now with LECG, LLC) to serve as the neutral and to lead an "arbitration team," comprised of an interdisciplinary panel of nationally recognized environmental scientists and attorneys.

Early Process Facilitation and Design Considerations

The first meeting of the Participants Group was held in March 1998 and before the end of the year, approximately 40 parties had signed the arbitration agreement and paid more than $900,000 to fund the arbitration process. Critical to the success of this effort was the development and use of an arbitration agreement.

As the operating manual for the Group, the arbitration agreement outlined procedures for:

- Administration of the group such as protocols for holding meetings, voting, use of funds, and, ex parte communications,
- Submittal and management of confidential information,
- Nomination of additional parties, and
- Establishing a method for arbitrating total response costs based on information submitted by parties and collected by the arbitrator.

With formal, agreed-upon guidelines in place, EnviroIssues' responsibility was to remain neutral, keep the group organized, and keep the process moving forward. Depending on the needs of the group, meetings were held about once a month, with a set agenda and prepared meeting materials distributed ahead of time. The formality and predictability of regular group meetings and communications helped the group establish a dynamic in which they were expected to collaborate, problem-solve, and respect an agreed-upon decision-making process. To the extent possible, the group used a consensus-based approach to resolve issues and relied upon

information and recommendations provided by a steering committee. In order to protect the fairness of the process to all parties, big or small, communications between the arbitrator and participants were primarily handled through EnviroIssues, as were many of the group's communications with regulatory agencies and additional parties.

The security of confidential information was of paramount concern to participants. A copy of the information repository was maintained at EnviroIssues, with access limited to representatives included on an approved list. The group also maintained tight control and made collective decisions about what, when, and how information was provided to the arbitrator, EPA, each other, and other parties. As the group's facilitator, EnviroIssues managed the distribution of information according to the specific guidelines provided in the arbitration agreement or agreed to separately by the parties.

Use of a neutral facilitator allowed the both the group participants and the arbitrator to focus on the cost allocation process and resolution of technical and legal issues without becoming side tracked by administrative and process concerns.

ADR Process Overview

The ADR process for the Foss Waterway consisted of two major phases: (1) a formal arbitration process convened under Chapter 7.04 RCW, and (2) a mediation process which, while not initially planned, used the preliminary arbitration results as a springboard for negotiation and ultimately resulted in the comprehensive settlement (thus obviating a final arbitration determination). An overview of each of these project phases is provided below.

Arbitration

The arbitration process was driven by the Arbitration Agreement negotiated by the initial participants. The process consisted of the following steps.

1. Disclosure Questionnaire and Public Records Review. The arbitration participants (numbering 35 at the outset) responded to a comprehensive "disclosure questionnaire," which required the respondent to disclose information concerning the historical operation of their respective waterfront or upland business and the quality and quantity of materials discharged to the waterway over time. As noted above, disclosure was made as settlement confidential communication, and disclosure materials were maintained in the confidential document repository at EnviroIssues. While the participants investigated the operating histories of their respective land parcels, the arbitration team conducted public record reviews at the federal, state and local levels in order to develop similar information with regard to non-participants. During this process, an important objective of the arbitration team was to ensure that all participants responded to the questionnaire with a comparable level of detail and diligence (and further to ensure that no participant would benefit from a comparable lack or candor or effort in their responses). The participants and the arbitration team were authorized to seek supplemental information from individual participants where necessary. In total, more than

300 boxes of information were produced during the disclosure step and were indexed, organized and maintained in the confidential repository.

2. Method Report. Based upon the arbitration team's review of public records and the participants' questionnaire responses, a general methodology (or "allocation formula") was proposed by the arbitrator and submitted to the participants for review and comment. By reaching early agreement on the general methodology for allocating costs, the participants could then make decisions on how to best advocate their respective positions during subsequent process steps. The method report and other reports produced by the neutral are confidential and protected from disclosure by agreement of the participants. Generally speaking, the allocation method assigned cleanup responsibility based upon the principle of "cost causation," meaning that PRPs are allocated responsibility based upon the cause/effect relationship between the type, quantity and location of their pollutant discharge to the requirement that sediments undergo remediation (and the associated cost of that remediation). Thus, in Superfund parlance, the allocation method focused on the participants' respective responsibility for so-called "remedy drivers," and proposed a general quantitative method for measuring each participant's relative contribution to remedy drivers.

3. Expert Reports. The Participants submitted more than 50 individual expert reports and rebuttal reports. Generally, these reports offered opinions in the field of environmental forensics. In effect, by relying upon sophisticated "chemical fingerprinting" and "pathway simulation" models, the various experts attempted to attribute today's sediment contamination to specific historical sources (and the PRPs responsible for those sources) – often based upon pollution events that occurred several decades earlier.

4. Position Papers. With the method report and expert opinions in hand, the participants now launched their advocacy. Each participant submitted a position paper containing legal, technical and equitable arguments as well as a rebuttal position paper on these issues. In total, more than 1,000 pages of argument were submitted. Had the positions advocated in the opening statements been accepted as submitted, less than 10% of the cleanup costs would have been allocated among the participants – while *100% funding* among participants would ultimately be required (due to the joint and several liability scheme of the Superfund law, as noted earlier). Thus, the arbitration team faced an uphill battle for achieving an acceptable allocation.

5. New PRP Nominations. Based upon the information contained in the arbitration repository, and with input from the participants, the arbitration team submitted "PRP Nomination Packages" to EPA in an attempt to expand the PRP list for the waterway. (As explained later, many of the nominated parties would later join the Participants Group and participate in the allocation and settlement process or, in the case of "orphan parties", meaning defunct or insolvent PRPs, be partially funded by EPA in order to achieve a comprehensive settlement among financially viable PRPs).

6. Preliminary Arbitration Report (PAR). Using the general allocation formula provided by the method report and considering the participants' numerous expert reports and position papers, the arbitration team developed and issued a confidential 300-page preliminary

arbitration decision, including various tables, figures and diagrams that explained the recommended allocation. Collectively, allocations were assigned to nearly 200 PRPs associated with approximately 1,000 waterfront and upland properties.

As originally designed, the next step of the arbitration process was to include the submission of participants' comments on the PAR, to be followed by the issuance of a final arbitration report (FAR). However, simultaneous with the issuance of the PAR, the arbitration team recommended (and the participants agreed) to temporarily stay the arbitration process so that a mediation process could be attempted to achieve an expedited settlement. Considerations that factored into the Group's decision to undertake mediation before the completion of the arbitration included:

1. The EPA was soon to issue "special notice letters" to most participants, which would have effectively served as a precursor to enforcement orders seeking to compel performance of the waterway remedy. These circumstances left the Group with little time to both complete the formal arbitration process and enter negotiations with EPA for performance of the waterway remedy, particularly when most participants in the arbitration contended that they had little to no liability.

2. The PAR results indicated that the Group consisted of two distinct categories of PRPs: first, a few participants with shares substantially in excess of 1% and, second, many participants with shares substantially less than 1%. Thus, it appeared that a settlement might be achievable by enabling most participants to "cash-out" their liability (including the payment of a "risk premium") and, in turn, induce the few larger participants to perform the remedy based upon the immediate availability of funds from "cash-out parties."

3. Because the PAR assigned significant shares of responsibility to non-participants, it appeared likely that a final and comprehensive settlement could only be achieved through the resolution of contribution claims that could (and likely would) be asserted against non-participants. The Group recognized the logistical difficulties for enabling non-participants to become engaged in a formal arbitration nearly three years after it had begun, hence a streamlined mediation seemed more practical for facilitating the entry of non-participants into the ADR process.

4. By design, some issues were not addressed in the arbitration, such as the re-allocation of "orphan shares," which collectively represented a major allocation share. Given that EPA would be looking to the participants to primarily shoulder the orphan share (apart from EPA's partial compensation of the orphan share under EPA settlement policy), the neutral recommended that this difficult issue be resolved through mediation. Other difficult issues that were not included in the arbitration process, but later gave rise to significant conflict, included the extent to which an individual participant's costs should be deemed recoverable, and thus subject to allocation. Again, the neutral recommended, and the participants agreed, that this issue would be best disposed of through mediation, if possible.

5. Given the above factors and the parties' recognition that only a small subset of the participants might be willing to perform the remedy, coupled with the consideration that EPA

would only support cash-out settlements if a performing group was identified and "at the table," the participants concluded that the neutral's primary effort should be directed to forming a performing party group, and mediating disputes related thereto. Moreover, the neutral and the participants recognized that, by design, the arbitration decision would only be binding if accepted by all participants; thus, a consensus building process would likely be required to form a performing party group and design a cash-out settlement process.

Mediation

The mediation began with initial sessions held with "prospective performing parties" to assess the feasibility for using the PAR shares as a negotiating "baseline" (or point of departure) for assembling a performing party group and achieving a final allocation between those parties. Significantly, these initial sessions were also designed to confirm the willingness of those parties to enable the arbitrator to serve as mediator (with an understanding that the mediator might revert back to an arbitrator role in the event the mediation would fail). Simultaneous with this effort, the mediator sought the entry of non-participants into the process (ultimately, the Participants Group would more than double in size).

After a prospective performing party group was assembled, the PAR shares were adjusted to reflect mediated agreements related to orphan share re-allocation and the amount of past costs the individual participants would be entitled to recover from other participants. Next, the mediation turned to group-wide negotiations with the prospective cash-out parties, and the resolution of the following issues: (1) the size of the risk premium that cash-out parties would pay to performing parties, (2) the amount of recoverable response costs that would be subject to allocation and (3) the scope of liability protection to be provided to cash-out parties in exchange for their lump sum cash contributions.

In addition, recognizing that the prospects for a achieving a comprehensive settlement were becoming increasingly favorable, EPA funded a mediation process designed to resolve DNR's alleged responsibility for the waterway cleanup. Participation in that mediation was limited to the performing parties and DNR. Ultimately, a final settlement was achieved between these parties, following the submission of position papers and extensive mediation sessions.

Keys to Success

Neutral's Perspective

By enabling the fact-intensive and complex scientific issues to be resolved on a preliminary basis by arbitration, followed by the mediation of more common "fairness" and "dollar-and-cents" disputes among only a small subset of participants (i.e., the "prospective performing parties"), the Participants Group devised an effective plan for resolving allocation disputes in both a comprehensive and final manner. Furthermore, the willingness of the original Participants Group to enable the neutral to seek a broader participation of PRPs in the process, and to allow those parties to join the ADR process in a fair and efficient manner, allowed the process to

resolve virtually all contribution claims for the waterway cleanup, and thus forego the all too familiar and wasteful litigation that traditionally accompanies Superfund sites.

Parties' Perspective

The following recounts, in outline form, many of the key reasons the participants entered into and persevered through the arbitration process. It also addresses the reasons why and how the process was able to avert a catastrophic, litigation-fueled outcome of the type referred to above.

1. Legal Situation – Key elements of the legal situation convinced many of the participants that pursuing an early resolution of their liability would be a sensible strategy.

a. Joint and several liability structure - - CERCLA provides that any contributor of contamination can be held liable for all costs of cleanup. Costs are allocated among multiple parties on contribution basis. The legal standard for contribution is unclear, and largely based on equitable considerations.

b. Very limited opportunity for summary judgment type legal defenses - - Very few parties who are shown to have contributed to contamination (on a more "probable than not" basis) can escape liability, regardless of whether past practices were acceptable at the time.

c. Regulatory agency oversight / enforcement threat - - All parties were at risk of EPA issuing a unilateral enforcement order to commence cleanup of the waterway. This would have been very costly for the receiving parties, and would have drastically limited the opportunities to get a cost-efficient process for allocating costs worked out. Constant pressure from EPA to keep the allocation process moving, using the (veiled) threat of enforcement, helped keep the allocation process on track.

d. Limited due process under CERCLA - - CERCLA provides for a due process review of EPA's determinations only after a site has been cleaned up. Since cleanups of this magnitude routinely take +10 years to complete, there were limited due process opportunities for addressing perceived problems with EPA's actions.

2. What Was at Stake? – Many of the participants in the arbitration had key interests at stake with respect to the circumstances of the cleanup at the waterway.

a. Cost share for cleanup - - The biggest consideration for most of the participants was determining how much they would have to contribute to the overall costs of the cleanup of the waterway.

b. Responsibility for performing remedy - - All of the parties were at risk of being required by EPA to take responsibility for or participate actively in the construction of the remedy. This was not viewed as a desirable position to be in by most participants. Ultimately the arbitration / mediation process helped to sort out who would perform the remedy.

c. Recommendation / selection of cleanup remedy - - EPA looked to the participants (particularly the City) to propose the design of the remedy. Many parties were concerned that the design not be used to prejudice the cost allocation process, and that the most cost efficient remedy be chosen. The arbitration / mediation process helped to ensure that outcome.

d. Urban redevelopment goals - - The City, and many of the property owners, were very concerned that the remedy move forward quickly so that Tacoma's urban redevelopment goals could be met without delay due to the stigma and worries associated with the presence of a contaminated waterway.

e. Continued operation of waterfront businesses - - Local business owners were concerned to ensure that the remedy would be compatible with the needs of waterfront and water-dependent businesses.

f. Liberate property values - - Property values around the waterway were perceived to have been suppressed due to the threat of cleanup liability. Implementation of the remedy and resolution of property owners' liability was expected to raise property values around the waterway.

3. What Process Design Features Significantly Contributed to the Outcome? – Key elements of the arbitration process helped to ensure the success of the arbitration.

a. Arbitration format (not mediation) - - The arbitration process offered a logical process for examining the issues associated with equitable allocation of liability among the many identified potentially responsible parties. It was designed to provide the participants with a fair chance to make their case, and to provide a form of due process, which is not otherwise typically provided in CERCLA cleanup actions.

b. Decision binding only if all parties agreed to accept their allocation - - The arbitration decision was designed to be binding, but only if all parties to the process were agreed, at the end of the process, to its use and publication to EPA. This assured efforts on the part of all parties to make sure the process (if not the outcome) worked for all of the participants.

c. Neutral decision maker, with no ex parte contact - - Previous experience of many of the parties with other similar processes made ensuring the neutrality of the arbitrator critical. Because of the long running nature of such arbitrations, there was a danger perceived that the arbitrator would become too familiar, and friendly, with certain of the more active / significant participants. Neutrality, and prohibitions on ex parte contacts, helped to ensure confidence in the process.

d. Process "convenor" who solicited parties, coordinated group meetings, and managed arbitration record - - EPA helped to fund the start-up of the allocation process through funding a "convenor" (EnviroIssues) to help coordinate the arbitration process and solicit parties who had not become part of the process early on to come into the arbitration process. This solicitation process worked well, and helped bring new parties into the arbitration. It also ensured EPA had a significant stake in the outcome of the arbitration.

e. Voluntary disclosure process - - Process required voluntary "lay-down" type disclosures, driven by a specific questionnaire and document disclosure requests. The participants drafted these, with input from the arbitrator.

f. Opportunity for further discovery to follow up on disclosures or to get discovery, including via subpoena - - A key feature of the arbitration process, it permitted follow-up questions to parties who were less than fully forthcoming with initial disclosures, and enabled discovery from non-participants of information that was material to their, and others', liability.

g. Decision based "on the arbitration record" - - Parties wanted a decision that was traceable to specific evidence against each party, and one which was clearly not driven solely by "ability to pay" type factors. Parties also wanted to ensure that the arbitration was conducted based on known evidence that was available to all - - a level playing field.

h. Opportunity for submission of expert reports - - Expert opinions played a key role in reconstructing the operations of businesses that operated on the waterway over the last 100 years. They also played a key role in enabling the arbitrator to diagnose the sources of the contamination and the connection between the costs of the remedy and the parties' release of contaminants. Rebuttal expert report opportunities also played a key role in ensuring all parties were fairly heard on scientific and technical grounds.

i. Arbitration team that included technical experts capable of careful analysis of submitted evidence - - The arbitration team had highly trained technical experts available to review the reports submitted to the arbitration record. Having this expertise available made the arbitrator's conclusions much more reliable from a technical standpoint. The technical issues raised by the expert reports were of the highest complexity.

j. Elimination of court-like procedures, including depositions, motions, and oral arguments - - The arbitration process removed many of the usual trappings of litigation in an effort to streamline the process and keep process costs down. The arbitrator did conduct party interviews. Depositions could have been taken (especially of non-parties) if the arbitrator approved of such a request, but none were requested. Nor was the lack of classic oral advocacy opportunities an impediment to achieving a process that was perceived as fair and neutral in its procedures.

k. Process confidentiality, including confidentiality of document disclosures, administrative record, and expert reports - - Process confidentiality was a key to ensuring broad participation. The arbitration record was to remain confidential, as were all advocacy pieces submitted to the arbitrator.

l. Process governance / decision-making open to all parties - - All parties were allowed to take part in the governance of the process. All arbitration process meetings were open to all participants, though not all participated equally. This openness generated a sense of ownership and involvement in the process design and implementation that helped ensure the parties' commitment to making the process worthwhile and effective.

m. Independent research / investigation of site / circumstances by arbitrator - - The arbitrator was originally expected to react only to materials submitted by the parties. As the arbitration process progressed, the arbitrator was commissioned to do independent historic research on parties, using publicly available records and materials. The arbitrator also consulted his team of experts to evaluate parties' likely history of discharge of contaminants. All records and information relied on by the arbitrator in preparing his initial report was maintained in the arbitration record and was accessible to all participants.

n. Arbitrator follow-up inquiries to parties in response to disclosures - - Arbitrator was permitted to focus additional investigation and questions to participants following initial disclosures.

o. Cost-causation basis for allocation - - As prescribed by the aforementioned "method report," which the participants accepted following a review and comment process, the allocation approach was designed to follow a cost-causation model, consistent with case law on how to allocate liability among multiple liable parties. The cost causation model is the closest to a "fault-based" allocation system for sites such as this, and was perceived by the parties as the "fairest" of available systems.

p. Settlement credit for arbitration process costs - - The arbitration costs were significant, even leaving aside the process costs directly experienced by the parties. The parties' process cost allocations were credited, however, against their liability shares, with the expectation that non-participants shares would be increased to reflect the process cost offsets provided to the settling parties.

q. Ability to speak with one voice to EPA - - Participation in the allocation proceeding enabled the participants to speak collectively with EPA about remedy selection and cleanup timing issues, and increased the parties' leverage in dealing with EPA. It also made EPA's dealings with the parties more efficient.

r. Allocation to all potentially liable parties, including orphans - - The arbitration agreement called for the Arbitrator to allocate shares of liability to all potentially responsible parties. Although many very minor parties were ultimately dropped from the allocation scheme, liability was ultimately allocated to far more parties than were participants, many of whom were orphan parties. The orphan allocations were very valuable, as they provided the basis for a request, subsequently granted, to EPA for forgiveness of oversight costs based on the presence of a significant number of orphan parties. Allocations to viable non-participants were also valuable, as they resulted in significant "after the fact" settlements from non-participants with little investment of time and energy beyond the arbitration process.

s. Opportunity to develop working relationship among parties - - By working together on the arbitration process and in dealings with EPA relating to the process, the parties developed a level of commitment to making the process work that was very helpful in ensuring the parties willingness to take the product of the arbitration through the subsequent mediation process to a final settlement.

t. Ability to argue for allocation to orphan share parties - - Parties were able to argue for fair shares to be allocated to all parties, present or absent, based on those parties' contributions. This enabled many parties to overcome the strong sense of unfairness that goes with the strict, joint, and several liability schemes that is prompted by CERCLA's liability provisions.

u. Orphan share re-allocation - - Once fair shares of liability were allocated, the parties faced the prospect of reallocating the shares allocated to orphan parties. The pain of reallocation was reduced because of EPA's willingness to forgive oversight costs, but not eliminated. The reallocation process was handled, efficiently and to the satisfaction of the parties, through the post-allocation mediation handled by the arbitrator. Settlement-oriented discipline was maintained throughout the mediation by the threat of preparing a final arbitration report that reallocated the orphan shares.

v. Arbitration submissions in form of position paper and rebuttal position paper - - The position papers allowed the arbitration parties to advocate aggressively, but efficiently, their theories of responsibility for the costs of the cleanup. Rebuttal papers permitted them to respond fairly and effectively to "surprise" theories coming from other parties. The parties used these opportunities to their full effect.

w. Ability for the neutral to adjust both cost share and responsibility to perform remedy in context of mediation - - The arbitration addressed only the question of the appropriate cost share allocated to each party. The subsequent mediation opened up two key additional issues: (1) which parties would accept responsibility for actually performing the cleanup remedy; and (2) which parties would accept liability for ensuring the long-term effectiveness of the remedy. Having these key issues on the table, along with the very significant cost issue relating to the allocation of orphan cost shares, provided the neutral with much more maneuvering room than would have been the case if the mediation had been limited solely to cost-share considerations.

4. Process Challenges / Tensions – With so many parties and interests involved, the process was bound to face significant tensions. By working through these tensions, the neutral, in partnership with the arbitration process steering committee, was able to keep the process on track.

a. Cost of process (both for arbitration and cleanup activities) - - The process costs for the arbitration were quite substantial - - over $1.2 million. This was a constant source of controversy for the participants, as initial cost estimates were significantly lower. Termination of the process was discussed on more than one occasion. The costs reflected a number of issues, though, including the early stage of the remedy selection process, the large number of parties involved, the complexity of the scientific and technical aspects of the site, the need for extensive interactions with EPA regarding circumstances at the site, and the need for a mediation to conclude the arbitration process. Most participants viewed the funds as well spent, at least in retrospect.

b. Length of time for process - - The process took a long time. It was more than 4 years from initiation to completion. During this time, there was a constant threat that the group would splinter or break apart.

c. Role of arbitrator as judge vs. inquisitor - - The original concept for the Arbitrator was to act as a judge reviewing the evidence and legal argument submitted as part of the arbitration process. As the arbitration developed, the Arbitrator's role was modified to include some independent factual investigation in addition to reviewing the materials submitted by the parties.

d. Tendency of parties to react defensively, rather than as vigorous advocates - - A successful arbitration often depends on parties making the case effectively against their opponents. In big multiparty arbitrations, though, there is a tendency for most parties to react purely defensively. This can result in a skewed allocation.

e. Arbitration over a remedy cost basis and design that was fluid and uncertain - - The arbitration was conducted before the final remedy was selected or designed. This meant that the costs being allocated were best-guess estimates, and the overall design was subject to potential design improvements and changes, including both cost savings and cost overruns.

f. Relationship between EPA and arbitration parties - - EPA, while generally supportive of the parties working out their cost allocation, was also interested in reaching closure regarding the remedy design and performance. Consequently, EPA was constantly pushing for a rapid closure of the cost allocation process. This provided needed discipline to the parties to close out the process, but also at various times threatened the parties' sense of fairness in the process.

g. Relationship between parties expected to be performing the remedy and likely cash-out parties - - Parties who expected to receive a smaller share of the liability allocation had, in some respects, differing interests with respect to the arbitration process than those who were facing likely larger allocations. Smaller parties were, in many instances, looking for a shorter, less expensive process, and a rougher form of "justice". Parties facing larger allocations, or concerned with possibly performing the remedy, tended to favor a more thorough examination of the technical and legal issues, and the proposed remedy.

h. Relationship between arbitration parties and arbitrator / mediator - - The arbitration ended up being considerably more expensive than originally commissioned. This raised questions, frequently, about the true value of continuing the arbitration.

i. Transition from arbitration to mediation - - Managing the change from an arbitration to a mediation once the initial arbitration results were provided was a tricky matter, particularly for the parties who viewed themselves as having "lost" in the arbitration. Fortunately, most of the participants viewed themselves as having "lost".

5. Key Attractions for Participation – Ultimately, a number of principal attributes of the arbitration enabled the parties to get a successful resolution of the issues subject to the arbitration/mediation process. They include the following:

a. Fair process and hearing - - All parties got a chance to make their case, and enough time in which to do so. Non-participants were frequently solicited to participate.

b. "Fail safe" process - - The process was confidential. If it failed to produce acceptable results, the parties could reasonably expect to be able to start any subsequent proceedings, such as litigation, with a clean slate.

c. Opportunity to achieve "finality" on liability issues - - The arbitration offered many of the parties the best, and quickest, route to getting a final resolution to their liability and an opportunity to "cash out" of long-term dealings with EPA.

d. Confidentiality - - The documents and advocacy submitted in the arbitration have been kept confidential. Much of this material could have been brought into the public light in the event of litigation.

e. Opportunity to get to a "fair" outcome - - The parties could have an arbitration proceeding that reflected comparative cost-contribution "fault" considerations, and allocations to all parties responsible, not merely those who had agreed to participate. The opportunity to gain orphan share credit, or to seek cost recovery from non-participants gave many parties a reasonable expectation that their allocated shares would reflect a fair allocation.

f. Opportunity partially to influence or control costs of remedy and remedy selection - - Participation in the allocation process gave the parties an organized way to raise issues about the cost and effectiveness of interim proposals for how to perform the remedy, an opportunity that is not often afforded to non-performing parties.

g. Large pool of participants - - The arbitration ultimately brought over 80 parties into the comprehensive settlement to share in the costs of the cleanup. This served to spread the costs more thinly that participants would have had otherwise to bear.

h. Comparatively "low impact" process - - While the arbitration process was itself expensive, the overall transactions costs were far lower than would have been the case if the dispute had been handled through litigation. In particular, the avoidance of deposition costs and the costs of motions and other litigation costs significantly cut transactions costs for most of the participants.

i. Credit for process costs - - The process cost offset was a major benefit for many of the parties who had smaller allocations. A small number of participants ended up having to pay either no settlement or only a minor settlement because their allocations were small enough to be offset by the costs they had incurred as part of the arbitration process.